IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOE M. TRUJILLO,

Plaintiff, No. CIV S-04-1485 PAN (JFM)

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant. ORDER

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The case is before the undersigned pursuant to 28 U.S.C. § 636(c) (consent to proceed before a magistrate judge). Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying an application for Disability Income Benefits ("DIB") under Title II of the Social Security Act ("Act"). For the reasons discussed below, the court will deny plaintiff's motion for summary judgment or remand and grant the Commissioner's cross-motion for summary judgment.

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I. Factual and Procedural Background

In a decision dated August 23, 2003, the ALJ determined plaintiff was no longer disabled.[1] The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review. The ALJ found plaintiff has the severe impairments of a herniated nucleus pulposus and disc protusion at L5-S1 with left and right radiculopathy, advanced osteoarthritis of the left knee, status post arthroscopic surgery on the left knee, and chronic neck pain, but that these impairments do not meet or medically equal a listed impairment; the impairments present as of November 1997, the time of the most recent favorable medical decision that plaintiff was disabled were degenerative disc disease, herniated disc in the

[1] Disability Insurance Benefits are paid to disabled persons who have contributed to the Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income ("SSI") is paid to disabled persons with low income. 42 U.S.C. § 1382 et seq. Under both provisions, disability is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R. §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The following summarizes the sequential evaluation:

> Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
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> Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.
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> Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App.1? If so, the claimant is automatically determined disabled. If not, proceed to step four.
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> Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.
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> Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

low back, and chronic neck, back, and shoulder pain; there has been an improvement in plaintiff's medical condition since November 1997; the medical improvement is related to plaintiff's ability to work; plaintiff's subjective complaints were found to be no more than partially credible; plaintiff retains the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently, walk and stand for two hours in an eight hour day, sit for six hours in an eight hour day, and occasionally perform postural activities; plaintiff has no manipulative, visual, communicative, mental, or environmental limitations; claimant is unable to perform his past relevant work as a construction worker; beginning in March 2002, plaintiff had the residual functional capacity to perform light work; plaintiff's disability ceased in March 2002; and plaintiff is not disabled. Administrative Transcript ("AT") 22-23.

Plaintiff contends that the ALJ committed a single error. Plaintiff argues that he meets the listing requirements for mental retardation found at 20 C.F.R., Pt. 404, Subpt. P, App.1, § 12.05C (hereinafter "Listing 12.05C") and that he is therefore presumptively disabled. See supra footnote 1. According to plaintiff, he is disabled because he suffers from both sub average general intellect and other physical and mental impairments that impose a limitation on his ability to work. (Pl.'s Mot. Summ. J. 6-10)

II. Standard of Review

The court reviews the Commissioner's decision to determine whether (1) it is based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)). Substantial evidence means more than a mere scintilla of evidence, but less than a preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorensen v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).

The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ's conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the ALJ's decision simply by isolating a specific quantum of supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative findings, or if there is conflicting evidence supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

III. Analysis

A. The ALJ's Failure to Find that Plaintiff Did Not Meet Listing 12.05C Was Not in Error.

The ALJ did not find plaintiff to be mentally retarded and therefore disabled under the regulations. See 20 C.F.R., Pt. 404, Subpt. P, App.1, § 12.05C. The ALJ offered no detailed analysis of plaintiff's mental impairments in his findings, focusing instead on plaintiff's numerous physical complaints. The ALJ's failure to find that plaintiff met the requirements for Listing 12.05C was not in error.

Section 12.05 is the Listing for mental retardation. Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. 20 C.F.R. § 404, Subpart P, Appendix 1, § 12.05. A person will be found disabled if they meet any of the parameters in the listing, including:

> C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function[.]

20 C.F.R. § 404, Subpart P, Appendix 1, § 12.05C.

The ALJ did not find that plaintiff suffered from any severe mental impairments. Indeed, the ALJ's opinion is devoid of any discussion of plaintiff's alleged low intelligence. The sole nonexertional limitation addressed by the ALJ was plaintiff's inability to read and write English. On this matter, the ALJ found no erosion in plaintiff's residual functional capacity as plaintiff had previously sought and maintained employment. AT 21.

The burden is on plaintiff to present evidence of disability. See Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). Plaintiff has failed in this task. The record considered by the ALJ and the Appeals Council contains no evidence of any mental impairment sufficient to meet Listing 12.05C or any other relevant listing.

Plaintiff has never indicated in any of his previous applications for benefits or in this case that he suffered from disabling mental impairments, claiming only physical impairments that kept him from working. AT 54-61, 83-90, 314-325, 328-333, 704-709, 716-717. Observers failed to document any mental impairment. AT 89, 125, 334-339, 662-673, 676-685, 702, 710-715. Indeed, just one year prior to the administrative hearing, plaintiff's wife reported that plaintiff had no problems concentrating or remembering. AT 714. Similarly, plaintiff had no issues maintaining employment prior to his injury, enjoying a long career in construction, performing skills that required measuring and careful cutting, as well as working and communicating with others. AT 87.

Furthermore, none of the treating or examining records document or diagnose any mental impairments. These records contains observations about myriad physical conditions and go back nearly 15 years. The sole reference to mental health care in the medical record relates to plaintiff's recovery from his physical injuries, and plaintiff's treating physician saw no need for any psychological evaluation. AT 822. Given the total absence of any evidence that could support any conclusion that plaintiff is mentally retarded, the ALJ's failure to find that plaintiff did not meet Listing 12.05C was not in error. See 20 C.F.R. § 404.1525(d)("To meet the

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requirements of a listing, you must have a medically determinable impairment(s) that satisfies all the criteria of the listing.")[2]

The ALJ properly evaluated the evidence in this case. There is nothing in the record considered by the ALJ to support plaintiff's contention that he is mentally retarded. Prior to this appeal, plaintiff has never claimed to be mentally retarded, the observations made by others have never supported such a finding, and plaintiff's doctors have never diagnosed any mental impairment, let alone offered any observation that plaintiff was mentally impaired. The burden lies squarely upon plaintiff to demonstrate that he is disabled and plaintiff has failed to meet that burden. The ALJ's findings will not be disturbed.

B. Remand for Consideration of Plaintiff's Additional Material Is Not Proper.

In support of his claim, plaintiff has submitted additional evidence during this appeal and asks this court to consider these records in determining whether the matter should be remanded to the Commissioner. The records submitted for the first time to this court are plaintiff's school transcripts dated 1973 to 1975, and the report of a consultative examiner retained by plaintiff. See Pl.'s Mot. Summ. J., Ex. A, B. The school records document plaintiff's poor performance in virtually all subjects while in school. Id. at Ex. A. The consultative examination from psychologist Dr. Finkel diagnoses a reading disorder, disorder of written expression, and borderline intellectual functioning. Id. at Ex. B.

A case may be remanded to the Secretary for the consideration of new evidence if the evidence is material and good cause exists for the absence of the evidence from the prior record. 42 U.S.C. § 405(g); Sanchez v. Secretary of HHS, 812 F.2d 509, 511-12 (9th Cir. 1987). In order for new evidence to be "material," the court must find that, had the Secretary considered this evidence, the decision might have been different. The court need only find a reasonable

[2] Given plaintiff's failure to demonstrate that he meets the first part of Listing 12.05C, a mental impairment, there is no need to examine plaintiff's argument that he also meets the second part, a "physical...impairment imposing additional and significant work-related limitation of function[.]" 20 C.F.R. § 404, Subpart P, Appendix 1, § 12.05C.

possibility that the new evidence would have changed the outcome of the case. Booz v. Secretary of Health and Human Services, 734 F.2d 1378, 1380-81 (9th Cir. 1984).

The new evidence fails to meet this standard. The submitted exhibits do not lead to any conclusion that the Secretary's decision in this case would have been different had these exhibits been considered. Given the evidence in the record of plaintiff's long work history, his previous complaints, and his medical history, none of which demonstrate any mental impairment, there is nothing in the 25 year-old school records or a single, additional consultative report that casts doubt upon the ALJ's conclusions. Submission of these materials after the Commissioner has issued an adverse ruling makes them all the less persuasive. See Weetman v. Sullivan, 877 F.2d 20, 23 (9th Cir. 1989).

Plaintiff claims psychological impairment for the first time on appeal. As noted above, there is no evidence in the medical record to support plaintiff's claim of impairment.[3] Given the lack of foundational support for the claimed mental condition, it can hardly be considered material. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004)(giving minimal weight to treating physician's opinions when clinical findings are not present); see also Bates v. Sullivan, 894 F.2d 1059 (9th Cir. 1990)(sustaining the Appeals Council's determination of immateriality where the new evidence was not consistent with the record), overruled on other grounds, Bunnell v. Sullivan, 947 F.2d 341, 342 (9th Cir. 1991)(en banc)

Even if this court were to find the additional evidence material, plaintiff has failed to offer any good cause for his delay in submitting this material. Indeed, plaintiff provides no justification for his delay. See Allen v. Secretary of Health and Human Services, 726 F.2d 1470,

[3] Plaintiff's claim of materiality to the question of disability in this case is further undermined by his pending appeal in a second claim for benefits. In that case, plaintiff argues that he has met the Listing of 12.05C since August 2003. The evidence supporting that claim is the same school records and report from Dr. Finkel submitted to this court. By initiation of his second claim for benefits, plaintiff has implicitly recognized the lack of relevance of his mental impairment to this claim.

1473 (9th Cir. 1984). Plaintiff admits that he advised his attorney prior to the hearing in this case of his poor reading and writing skills and the subsequent embarrassment he felt as a result of his illiteracy. Pl.'s Mot. Summ. J. 8-9. At that hearing, plaintiff's attorney examined plaintiff on those areas. AT 54-55.

However, following his confession, plaintiff waited nearly two years after his May 19, 2003, administrative hearing to seek the opinion of a consultative psychologist. At no point in the intervening time did plaintiff seek to submit to the ALJ or the Appeals Council any additional materials that might support his position of impaired mental functioning, despite the fact that the ALJ left the administrative record open at the conclusion of the hearing in order to permit the introduction of additional evidence. AT 60. Plaintiff's school records have been in existence for nearly 20 years, but no attempts was made by plaintiff to offer them prior to this appeal. Also, given plaintiff's lifetime of illiteracy and presumed awareness of his poor mental functioning, and his admission to his attorney prior to the administrative hearing, it cannot be said that plaintiff did not know of his alleged disability.[4] See Burton v. Heckler, 724 F.2d 1415, 1418 (9th Cir. 1984)(establishing good cause where the evidence did not exist at the administrative level). The record fails to demonstrate and plaintiff offers no evidence of any impediment that could have prevented him from obtaining or submitting the school records or the consultative examination offered in this case. Mere delay cannot be considered good cause.

Furthermore, plaintiff cannot claim that he was unaware of his ability to submit additional materials as supplemental orthopedic records documenting plaintiff's physical impairments were entered into the record following the hearing. AT 719-720. In spite of the awareness of his condition and the opportunity to submit matters following denial of his claim, AT 13-15, plaintiff did nothing. Plaintiff has failed to show good cause to support his request for remand in order to consider the additional evidence of his mental impairment.

[4] This assumes that illiteracy meets Listing 12.05C. The court offers no opinion on this issue.

The record fails to demonstrate that plaintiff suffers from any mental impairment sufficient to meet Listing 12.05C. Plaintiff's admissions, the observations of others, and, most importantly, the medical records do not indicate that plaintiff suffers from any mental retardation. The additional materials offered by plaintiff for the first time on appeal to this court to support his claim are not material, as they are contrary to the overwhelming evidence. Furthermore, plaintiff fails to provide any cause, good or otherwise, to justify his delay in submitting these materials.

The ALJ's decision is fully supported by substantial evidence in the record and based on the proper legal standards. Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment or remand is denied, and

2. The Commissioner's cross-motion for summary judgment is granted.

DATED: January 30, 2007.

UNITED STATES MAGISTRATE JUDGE

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